

[The] certificate is endowed with a proprietary interest capable of transfer. \* \* \* [I]t passed to the Trustee in Bankruptcy because it was transferable property \* \* \*. [W]e are not able to discern any logical basis why it could not properly become the subject matter of a valid chattel mortgage.

F. There is no Reason to Deny a Security Interest in a Broadcast License, While Allowing a Licensee to Pledge its Stock.

Although the Commission has observed in the past a concern that allowing a license to be hypothecated as security for a debt might "endanger[] the independence of the licensee," see, e.g., Radio KDAN, 13 R.R.2d at 102, that concern has not prevented the Commission from permitting corporate licensees to pledge their stock. So long as the licensee-borrower retains voting rights and the pledged stock is made subject to a public or private sale, a stock pledge is not considered to impermissibly "jeopardiz[e] the independence of the licensee." Minority Ownership, 99 F.C.C.2d at 1254. There is no reason why a security interest, which also preserves the licensee-borrower's voting rights and provides for a public or private sale of the license in the event of default, should not also be permissible in a license.

In declining to permit any automatic reversionary interest in a license as a means to advance minority ownership in 1985, the Commission left the door open to examine other "proposals on alternative security interests short of an

automatic reverter." Id. at 1253-54. The Commission also noted that the stock of a corporate licensee could be pledged. "To the extent that potential seller-creditors can fashion analogously protective yet beneficial mechanisms," the Commission stated, "we would welcome the opportunity to consider them." Id. at 1254. This Petition for Declaratory Ruling presents such an opportunity.

IV.      Allowing a Security Interest in a License, Made Subject to a Public or Private Sale, Would Fully Preserve FCC Jurisdiction and Meet UCC Requirements.

As stated in Merkley, supra, the Commission's real interest is in protecting its authority over the identity and actions of the licensee. This legitimate interest has unnecessarily led the Commission to a concern that permitting a licensee to grant a security interest in the license would somehow limit the Commission's regulatory discretion. But the Commission does not have to find that the licensee has unlimited rights to permit the grant of a security interest in a license. It is well settled that the Uniform Commercial Code does not require a debtor to have "title" to collateral before a security interest may attach, but only requires that the debtor have "rights in the collateral." See State Bank of Young America v. Vidmar Iron Works, Inc., 292 N.W.2d 244 (Minn. 1980).

In other contexts, courts have recognized that what may be merely a "privilege" under other laws may be "property" under the UCC. The United States Court of Appeals for the Tenth Circuit, for example, has held that a liquor license, though a "personal privilege," may also be treated as "property" and made subject to a security interest:

Although by the terms of the [Wyoming] liquor control statute a [liquor] license is a personal privilege which is not subject to attachment, garnishment or execution, it nevertheless has \* \* \* an element of transferability and under certain conditions it may be sold \* \* \*. These characteristics stamp a liquor license as an item of property, even though it is statutorily said to be a personal privilege as well. Moreover, the license falls within the class of intangibles expressly enumerated in the Uniform Commercial Code as "property" within its scope. So, the Code permits the creation of a security interest in such a license.

Bogus v. American National Bank of Cheyenne, 401 F.2d 458, 461 (10th Cir. 1968). The South Dakota Supreme Court also has recognized this principle, though expressing it as the difference in rights between parties. In Rushmore State Bank v. Kurylas, Inc., 424 N.W.2d 649, 654 (S.D. 1988), the court held that although there is no property right in a liquor license as between the state and the licensee, a property right does exist as between the licensee and third party creditors. The United States District Court for the District of Alaska similarly held, in another liquor license case:

[W]hile the personal privilege analysis may be applicable to a dispute between the license holder and the Board, such analysis is not applicable between the holder and a secured party who relied upon the license for collateral in loaning funds.

Gibson v. Alaska Alcoholic Beverage Control Board, 377 F. Supp. 151, 154 (D. Alaska 1974) (footnotes omitted).

A security interest is merely an interest in whatever rights the debtor has in the subject of those rights -- here, a broadcast license. The debtor cannot give greater rights to a secured party than the debtor has. The grant of a security interest, governed by the UCC and subject to the rules and regulations of the FCC, would not interfere with the regulatory scheme governing the debtor's rights in, or manner of use of, the collateral. Thus, the secured party would take its interest in the license subject to all the limitations that are imposed on the licensee. Transfer of a license would continue to be subject to prior Commission approval. In an analogous situation, the Alaska Supreme Court found that although a liquor license was subject to a security interest, it was nonetheless the responsibility of the Alcoholic Beverage Control Board to approve any license transfer:

Because the Alcoholic Beverage Control Board is authorized to control the sale of intoxicating liquor by issuing only those licenses which it considers "in the best interests of the public," any transferee, even one who takes for valuable consideration, actually takes only the right to petition the ABC board \* \* \*. It was

this right of petition which the parties intended to serve as a security interest.

Queen of the North, Inc. v. LeGrue, 582 P.2d 144, 149 (Alaska 1978) (footnotes omitted).

The UCC expressly contemplates that it may coexist with a federal statutory scheme relating to the attachment or perfection of a security interest. UCC Section 9-104(a) states that "[Article 9] does not apply (a) to a security interest subject to any statute of the United States, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property." The Commission may, therefore, implement its own regulatory scheme regarding security interests in broadcast licenses to protect its legitimate interests in regulating licensees. That scheme would preempt the UCC to the extent that the federal statute governs the rights of the parties. To the extent that the Commission did not provide rules that would otherwise be provided by Article 9, Article 9 would then apply. See UCC § 9-104, Official Comment 1.

V. Conclusion.

As described above, current FCC policy restricting security interests in licenses is not mandated by the Communications Act and adversely affects the public interest. There is no statutory or policy reason for treating security interests in FCC licenses differently from security interests

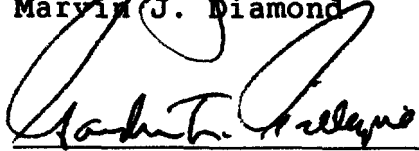
in the stock of a licensee. Thus, in a manner comparable to the policies affecting stock pledges, we suggest that the Commission declare that security interests in licenses issued by the FCC are permissible if such security interests:

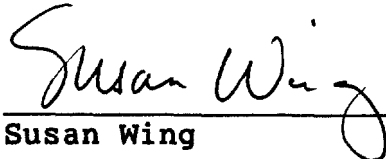
(a) Leave control of the license with the licensee, even following an event of default, unless and until the FCC has approved an assignment of the license to a new party;

(b) Provide that, in the event of default, the license be put up for public or private sale together with the other assets in which a security interest is held.

Respectfully submitted,

  
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Radio Act of 1927  
Public Law No. 632, 69th Congress  
[H.R. 9971]

[Sec. 1]. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act is intended to regulate all forms of interstate and foreign radio transmissions and communications within the United States, its Territories and possessions; to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by individuals, firms, or corporations, for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio \* \* \* except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Sec. 5. \* \* \* No station license shall be granted by the commission or the Secretary of Commerce until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or wave length or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

Sec. 11. \* \* \* Such station licenses as the licensing authority may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject;

(A) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies or wave length designated in the license beyond the term thereof nor in any other manner than authorized therein. \* \* \*